

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:POSTF-130405-02

EYWu

date: JUL 19 2002

to: Josephine M. Robinson, Team Manager, HMT 1752
Pablo Fernandez, Revenue Agent, Santa Ana

from: June Y. Bass, Associate Area Counsel (LMSB)
Joyce M. Marr, Senior Attorney (LMSB)
Erica Y. Wu, Attorney (LMSB)

subject: Taxpayer: [REDACTED]
EIN: [REDACTED]
Tax Year: [REDACTED]
Issue: Form 872
Statute of Limitations: September 15, [REDACTED]

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request dated June 3, 2002. This memorandum should not be cited as precedent.

ISSUES

1. What is the proper caption for a consent to extend the time to assess any Federal income tax due on the consolidated return filed by [REDACTED] (fka [REDACTED]) for the tax year ending December 31, [REDACTED]?
2. Who can sign the consent?
3. Whether the Service should obtain a Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary, from any party?

CONCLUSIONS

1. The Form 872 should be captioned as:

____ (EIN _____) (formerly known as _____
 _____), as successor in interest to _____
 _____ (EIN _____) (formerly known as _____
 _____)*

At the bottom of the front page, type in:

* This is with respect to _____ (EIN _____)
 consolidated group's income tax liability for the tax year ending
 _____.

2. In accordance with I.R.C. §6062, the Form 872 should be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act for _____ (EIN _____).
3. There is no need to obtain a Form 977 in this case.

FACTS¹

____ ("____") (EIN _____), formerly known as _____, filed a consolidated return for the _____ calendar as the common parent of an affiliated group ("____") consisting of itself and a subsidiary named _____ (the "Subsidiary") (EIN _____).² That return shows the taxpayer's name as "____" (fka _____)

On December 31, _____, in a tax-free transaction under I.R.C. § 368(a)(1)(A), _____ and the Subsidiary merged into a corporation named _____ ("____") with _____ as the surviving corporation. The merger agreement provides: (1) the separate existence of each of the merged corporations would cease to exist; (2) the merged corporations' debts and liabilities would attach to the surviving corporation; (3) the merged corporations' stock would be canceled and their shareholders would not receive any stock

¹ Our understanding of the facts of this case is limited to the facts presented by you. We have not undertaken any independent investigation of the facts of this case. If the actual facts are different from the facts known to us, our legal analysis and our conclusions and recommendations might be different. Accordingly, if you learn that the facts known to us are incorrect or incomplete in any material respect, you should not rely on the opinions set forth in this memorandum, and should contact our office immediately.

² The Subsidiary was also known as _____.

from the surviving corporation in return; and (4) the merger would be governed by California law.

_____ changed its name to _____ ("_____") immediately following the merger. _____ still exists. Its EIN is _____.

DISCUSSION

1. Form 872.

I.R.C. § 1501 grants affiliated groups of corporations the privilege of filing returns on a consolidated basis. If consolidated returns are filed, the members of the group consent to be bound by the regulations promulgated under I.R.C. § 1502. I.R.C. § 1501. Under those regulations, the common parent of the consolidated group shall be the sole agent for the members of the group with respect to the group's consolidated tax liability. Treas. Reg. § 1.1502-77A(a).³ The common parent and any other member of the consolidated group shall be severally liable for the tax liability for the consolidated return year. Treas. Reg. § 1.1502-6(a).

As sole agent, the common parent has the authority to act in its own name for all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77A(a). Thus, as a general rule, only the common parent may execute a consent to extend the limitations period for any taxable year during which it was the common parent. *Id.* This general rule, however, does not apply when the common parent has merged out of existence. In that case, if the state law governing the merger holds the surviving corporation primarily liable for the merged corporation's debts, the surviving corporation is the one that must sign the consent on behalf of the merged corporation. See *Gott v. Live Poultry Transit Co.*, 17 Del. Ch. 288, 153 A. 801 (1931). The surviving corporation should sign the consent as "Surviving Corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972). If the surviving corporation has undergone a name change, the consent should be prepared using both names, such as "Mary Doe, formerly Mary Brown." See Section 22.5.2 of IRM 121.2, Statute of Limitations Handbook.

This case involves a consolidated tax liability of an affiliated group whose members have merged out of existence in a merger governed by California law. Since each member of a consolidated group is severally liable for the entire group's tax, we must determine whether California law holds _____, the sole successor to the former members of _____, primarily responsible for _____'s _____ income taxes.

Under California law, when a merger takes effect: (1) the separate existence of the disappearing corporation ceases; (2) the surviving corporation shall succeed to all the rights and

³ Treas. Reg. § 1.1502-77A, designated as § 1.1502-77 before Proposed Treas. Reg. § 1.1502-77 became finalized on June 28, 2002, applies in general to statute of limitations waivers relating to tax years beginning before June 28, 2002. 67 FR 43538.

property of the disappearing corporation; and (3) the surviving corporation shall be subject to all the debts and liabilities of the disappearing corporation as if the surviving corporation had itself incurred them. See Cal. Corp. Code § 1107(a) (West 2001). Thus, [REDACTED] inherited [REDACTED]'s and the Subsidiary's respective several liabilities for [REDACTED]'s [REDACTED] income taxes as a successor in interest.

Based on the foregoing, we recommend the Form 872 be captioned as follows:

[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])
[REDACTED], as successor in interest to [REDACTED]
[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])
[REDACTED]*)

At the bottom of the front page of the Form 872, type in:

* This is with respect to [REDACTED] (EIN [REDACTED])
consolidated group's income tax liability for the tax year ending
December 31, [REDACTED].

At the Corporate Name line in the signature block, type in "[REDACTED]
(EIN [REDACTED])."

You should insert [REDACTED]'s EIN ([REDACTED]) in the "Taxpayer Identification Number" block located at the upper right hand corner of this Form 872.⁴

There is no need for [REDACTED] to sign another Form 872 as the successor to the Subsidiary.

2. Who may sign the Form 872.

Under Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified by Rev. Rul. 84-165, 1984-2 C.B. 305, an individual who is authorized under I.R.C. § 6062 to sign the tax return will also have the authority to execute the statute extension. I.R.C. § 6062 provides that generally, a corporation's income tax returns must be signed by its president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act. Thus, any of the aforementioned officers of [REDACTED] may sign the Form 872.

⁴ Section 22.5.8 of IRM 121.2, Statute of Limitations Handbook, provides that the taxpayer's EIN should be shown in the upper right hand corner of the Form 872. Since [REDACTED] is the taxpayer primarily liable for [REDACTED]'s tax liability, its EIN should appear at the upper right hand corner of the Form 872.

3. Form 977.

We do not recommend obtaining a Form 977 in this case. [REDACTED] is already statutorily and contractually liable for [REDACTED]'s income taxes by virtue of the California merger statutes and the parties' merger agreement. Further, the present policy of the Office of Chief Counsel is to obtain transferee consents against successor entities only when the Service is in the last resort situation where the statute of limitations under I.R.C. § 6501 has expired but the statute of limitations under I.R.C. § 6901(c) is still open. Here, the Service will not be in the last resort situation because the three-year period of limitations under I.R.C. § 6501 has not expired and will be extended for the transferors.

4. Notice Requirement.

We recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the Statute of Limitations Handbook, IRM 121.2.22 provides procedures for processing consents to extend the statute of limitations on assessment. In particular, IRM 121.2.22.3 sets forth procedures to comply with the notification that the Service must provide taxpayers on each occasion when the taxpayer is requested to extend the statute of limitations by consent. The IRM requires that this notification be made to the taxpayer by sending or presenting the most recent Letter 907 and sending or presenting Publication 1035, which together inform the taxpayer of its right to refuse to extend the limitation period, the right to request the extension to be limited to a particular issue, and the right to request the limitation period to be limited to a specific date.

This advice has been coordinated with the National Office using the pre-preview procedure. Please contact Erica Wu at (949)360-2678 if you have any questions.